In the Supreme Court of the United States

OCTOBER TERM, 1974

No.—

UNITED STATES OF AMERICA, PETITIONER

v.

RELIABLE TRANSFER CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) is reported at 497 F. 2d 1036. The memorandum and order of the district court (App. B, *infra*) is unreported.[1]

JURISDICTION

The judgment of the Court of Appeals (App. C, *infra*) was entered on May 23, 1974. On August 13,

[1] We have not reproduced the unreported decision and order of the district court dated February 7, 1973 assessing the dollar value of the damages in accordance with the memorandum and order reproduced as App. B, *infra*.

559-331—74——1

1974, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Marshall to and including October 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the admiralty rule of equally divided damages currently applied in collision cases should be replaced by the rule of damages in proportion to fault.

STATEMENT

The facts are not in dispute and are set forth in the opinion of the district court (App. B, *infra*, pp. 12–20).

The vessel *Mary A. Whalen*, owned by respondent, Reliable Transfer Co., left Constable Hook, New Jersey, on December 23, 1968, taking a course that led her through the 400-yard-wide Rockaway Inlet en route to her destination at Island Park, New York. The Inlet lies between a breakwater to the east and the shore to the west. The breakwater is marked at its southern terminus by the Rockaway Point breakwater light, which is maintained by the Coast Guard and is usually visible for four miles. On the night of the *Mary A. Whalen*'s journey this light was not functioning.

While negotiating the Inlet, the Captain of the *Mary A. Whalen* negligently maneuvered to pass a fast-moving barge ahead of his vessel. Failing to overtake the barge, the Captain, without proper precaution, made a U-turn, passed behind the barge, and set off on an easterly course. A minute thereafter an object loomed in front of his craft. This proved to be

the Rockaway Point light structure on the breakwater. Swerving to avoid the rocks, the Captain ran the ship aground.

Thereafter respondent filed suit against the United States in the district court pursuant to the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, seeking recompense for damages sustained by its vessel by reason of the grounding.

The district court found that the grounding was caused 25 percent by the Coast Guard's failure to maintain the breakwater light but 75 percent by the Captain's negligence in failing to check his position before setting his vessel on a new course. "Equipped with look-out, chart, searchlight, radio-telephone, and radar," wrote the court, "[the captain] made use of nothing except his own guesswork judgment" (App. B, *infra*, p. 19). The court held, however, that the admiralty rule of divided damages dictated that each party bear one-half of the losses, noting that "[w]hile division of damages in proportion to the degrees of fault may be more equitable, it appears to be forbidden by controlling precedent" (App. B, *infra*, p. 22).

The court of appeals affirmed the factual findings of the district court and the division of damages, stating that while it is "mindful of the criticism of the equal division of damages rule" it prefers "to leave doctrinal development to the Supreme Court or to await appropriate action by Congress" (App. A, *infra*, p. 11).

REASONS FOR GRANTING THE WRIT

1. This case presents in clear form the important question of whether the American admiralty rule of divided damages should be overruled. The divided damages rule, a court-made rule, is now contrary to the rule of every major sea-going nation and has been criticized by doctrinal writers and major admiralty courts within this country (see discussion *infra*). The rule provides that in collision cases where mutual fault is shown the damages are to be divided equally regardless of the degree of fault of each party. This Court granted certiorari in *Union Oil Co. of California* v. *The San Jacinto*, 409 U.S. 140, principally to consider the continued appropriateness of the rule (see Justice Stewart's dissent, 409 U.S. at 150) but failed to reach the issue when a finding was made absolving one of the vessels from fault.

The present case squarely presents the issue for resolution.

2. The divided damages rule should be abandoned in favor of a rule which would apportion damages on the basis of the relative fault of the parties.

The divided damages rule was adopted by this Court in *The Schooner Catharine* v. *Dickinson*, 17 How. 170, as an amelioration of the common law rule forbidding recovery to one contributorily negligent. It has been followed in collision cases for over 100 years[2] and

[2] See, *e.g.*, *The Washington and The Gregory*, 9 Wall. 513; *The North Star*, 106 U.S. 17; *The Chattahoochee*, 173 U.S. 540; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282; *Weyerhaeuser SS. Co.* v. *United States*, 372 U.S. 597.

has been extended to cases such as this, where a vessel has gone aground. *White Oak Transp. Co.* v. *Boston, Cape Cod & New York Canal Co.*, 258 U.S. 341. The rule, however, works poorly where one party's negligence is considerably greater than the other. The instant case is an example of this. Despite a clear finding that the United States bore at most 25% of the fault, it was ordered to pay 50% of the damages.

The lower federal courts have criticised the rule as "unjust and arbitrary,"[3] "[an] ancient rule which has been abrogated by nearly all civilized nations"[4]

[3] *Tank Barge Hygrade* v. *The Gatco N.J.*, 250 F. 2d 485, 488 (C.A. 3): "The rule of equal division of damages appears to have been founded upon the difficulty of determining, when both vessels were at fault, the degree of negligence in the one and the other. It was *judicium rusticum*, a sort of rough and ready rustic justice applied to the sea. The Max Morris, 1890, 137 U.S. 1, 12, 11 S.Ct. 29, 34 L.Ed. 586. When the faults are roughly equal the operation of the rule is just and satisfactory enough. Where, however, the fault of one vessel is palpably major and that of the other extremely minor the obvious injustice of the application of the rule of equal division of damages has led the courts to avoid it by glozing and ignoring the minor fault and imposing sole responsibility upon the vessel gravely at fault, as was done in some of the cases upon which the appellant here relies. But to ameriolate the unjust effect of one arbitrary rule by applying another which is equally arbitrary seems hardly the way to promote justice and reach an equitable result. How much better it would be to apply, in cases where it was feasible to do so, a rule of comparative fault analogous to that now applied in the admiralty in cases of personal injuries."

[4] *National Bulk Carriers, Inc.* v. *United States*, 183 F. 2d 405, 410 (Learned Hand dissenting) (C.A. 2), certiorari denied *sub nom. Burns Steamship Co.* v. *National Bulk Carriers, Inc.*, 340 U.S. 865.

and "unfair."[5] They have, however, felt constrained to follow it.[6]

This Court itself has recognized the rule's potential for producing inequitable results by establishing the so-called "major-minor" rule which provides that where a vessel is guilty of gross misconduct it will be held fully liable for damages, even where the other vessel has also been negligent. *The City of New York*, 147 U.S. 72; *The Umbria*, 166 U.S. 404. The "major-minor" rule, however, applies in only a few cases, and itself subjects vessels to liability in excess of their fault. In the words of Learned Hand it is "in the nature of a sop to Cerberus. It is no doubt better than nothing; but it is inadequate to reach the heart of the matter, and constitutes a constant temptation to courts to avoid a decision on the merits." *National Bulk Carriers, supra*, n. 4, 183 F. 2d at 410. The two rules together do not achieve the equity of the rule of proportional damages.

This Court has rejected the application of the equal division rule in admiralty personal injury cases, in favor of proportional fault, holding that by virtue of its traditional discretion, admiralty allows such consideration of contributory negligence in mitigation of

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[5] *Ahlgren* v. *Red Star Towing and Transp. Co.*, 214 F. 2d 618, 620 (C.A. 2).

[6] There have been exceptions. The Court of Appeals for the Third Circuit in *The Margaret*, 30 F. 2d 923, actually allocated damages in proportion to fault, but modified its order on rehearing to conform with the Supreme Court rule. The Second Circuit acted more boldly in *Marine Fuel Transfer Corp.* v. *The Ruth*, 231 F. 2d 319, where it affirmed without comment the district court's 60–40 apportionment of damages (135 F. Supp. 371 (E.D.N.Y.)).

damages "as justice requires." *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 409. The same principles of equity prompting that decision are applicable here.

3. Although the divided damage rule has its roots in English and French jurisprudence[7] these countries long ago abandoned it for liability in proportion to fault, and the United States is today the only major seafaring nation which follows the rule.[8] The isolated maintenance of the divided damages rule by this country thus encourages trans-oceanic forum shopping and is another reason for abandonment of the rule

[7] The antecedents of the rule are discussed fully in *The North Star*, 106 U.S. 17, 20–22, and *The Max Morris*, 137 U.S. 1, 12–13.

[8] While there was considerable divergence in the apportionment of damages in the 19th Century all major sea-faring nations except the United States have now ascribed to the Brussels Convention of 1910 (International Convention for the Unification of Certain Rules to Govern the Liability of Vessels When Collisions Occur Between Them), which, among other things, provides for proportional liability. See 6 Knauth's *Benedict on Admiralty* (7th ed., rev.), pp. 37 *et seq.*, for the text of the Convention and a list of the ascribing nations. For a discussion of the reasons why the United States did not ratify the Convention—reasons concerned with disagreement as to the handling of cargo claims, not proportional liability between vessels—see Comment, *The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions to Achieve International Agreement on Collision Liability, Liens, and Mortgage*, 64 Yale L.J. 878 (1955). The part of the Convention pertinent here (in the congressional translation quoted by Knauth, p. 39), states, with considerable clarity:

> Art. 4. If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.

Isbrandtsen Co. v. *Lloyd Brasiliero,* 85 F. Supp. 740 (E.D.N.Y.); Gilmore and Black, *The Law of Admiralty,* Sec. 7–20, p. 439 (1957 ed.).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1974.

APPENDIX A

United States Court of Appeals for the Second Circuit

RELIABLE TRANSFER CO., INC.

v.

UNITED STATES OF AMERICA

PER CURIAM:

This case arises from a little saga of the sea—this time involving a coastal tanker, the Mary A. Whalen, that got lost in the waters just outside New York harbor on a clear night in December 1968 when the seas were rough, the tide was running strong and a breakwater light maintained by the Coast Guard was out. The tanker ended up stranded on a sand bar off Rockaway Point.

The owner of the tanker, Reliable Transfer Co., Inc., invoking the admiralty and maritime jurisdiction of the district court under the Suits in Admiralty Act, 46 U.S.C. §§ 741 et seq. (1970), sued the United States to recover damages sustained by the stranded tanker.

After a bench trial in the Eastern District of New York before Orrin G. Judd, *District Judge,* the court found that the stranding of the tanker was caused 25% by the negligence of the Coast Guard in its failure properly to maintain the breakwater light and 75% by the negligence of the vessel in making a U-turn in a dangerous channel when its captain knew that the breakwater light was not operating. The court

559-331—74——2

held under controlling law that each party should bear half of the damages.

We hold that the court was not clearly erroneous in finding that the negligence of both parties, in the proportions stated, caused the stranding.

The vessel's claim that it was not at fault borders on the frivolous; under circumstances requiring extreme care in navigation and with adequate navigation instruments available, the captain simply got lost and was considerably further north than he thought when he made a U-turn in a dangerous channel knowing that the breakwater light was not operating.

We also reject the government's claim that its failure properly to maintain the breakwater light was merely a condition rather than a cause of the stranding. Surely it was a but-for cause. The court found, as common sense would dictate, that if the breakwater light had been operating the captain would not have stranded the vessel. Viewing the government's claim as essentially a variation of the last clear chance doctrine—given the captain's knowledge of the dangerous situation, he should have been able to avoid the stranding—we refuse to apply here the doctrine of last clear chance which has been given only limited application in admiralty. See *Petition of Kinsman Transit Co.*, 338 F. 2d 708, 719–21 (2 Cir. 1964), *cert. denied*, 380 U.S. 944 (1965).

We also decline the invitation to seize upon this case as a vehicle to overrule the equal division of property damage rule that has long applied in admiralty cases where both parties are at fault. *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597, 603 (1963); *The Max Morris*, 137 U.S. 1, 13 (1890); *North Star*, 106 U.S. 17 (1882). And we particularly see no basis either in authority or in principle for saying that the

rule should apply in collision cases but not in stranding cases; for it was so applied in *Atlee* v. *Northwestern Union Packet Co.*, 88 U.S. (21 Wall.) 389 (1874). We of course are mindful of the criticism of the equal division of damages rule and we recognize the force of the argument that in this type of case division of damages in proportion to the degree of fault may be more equitable. *Ulster Oil Transport Corp.* v. *The Matton No. 20,* 210 F. 2d 106, 110 (2 Cir. 1954) (L. Hand, *J.*, dissenting); Black & Gilmore, Admiralty § 7–20, at 440 (1957). But we also are not insensitive to the considerations rooted in strong public policy that have impelled our Court as one of the inferior federal courts for many years to abstain from attempting to change the law in areas such as this, preferring to leave doctrinal development to the Supreme Court or to await appropriate action by Congress. *In re Adams' Petition,* 237 F. 2d 884, 887 (2 Cir. 1956); cf. *McLaughlin* v. *Trelleborgs Augfartygs A/B,* 408 F. 2d 1334, 1338 (2 Cir.), *cert. denied,* 395 U.S. 946 (1969); *Benazet* v. *Atlantic Coast Line Railroad Co.,* 442 F. 2d 694, 697 (2 Cir. 1971), *aff'd,* 406 U.S. 340 (1972). As Judge Hincks so aptly put it in *In re Adams' Petition, supra,* 237 F. 2d at 887:

> "[T]he rule of equal division of property damage is so well established in this country that it would create intolerable confusion were a court of intermediate jurisdiction such as ours to deviate from it. We shall therefore continue to apply the rule until there shall be authoritative sanction for departure therefrom."

We agree.

We affirm substantially for the reasons set forth in the well reasoned opinion of Judge Judd below. —— F. Supp. —— (E.D.N.Y. 1973).

Affirmed.

APPENDIX B

United States District Court Eastern District of New York

70–C–282, April 20, 1972

RELIABLE TRANSFER CO., INC.

against

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

JUDD, J.

This admiralty case tried by the court involves the stranding of the tanker Mary A. Whalen on the sand immediately west of the Rockaway Point breakwater light on a windy night in December when the light was not functioning. The vessel was not driven ashore by the wind, but was steered directly toward the light by a captain who believed that he had open sea ahead. He had misjudged his position after a turning maneuver necessitated by the presence of a tug and tow in his previous course. If the breakwater light had been flashing, he would doubtless have been able to change his course in time to avoid stranding.

THE FACTS

The *Mary A. Whalen,* one of plaintiff's oil tankers, took a full load of fuel oil on December 23, 1968 at Constable Hook, New Jersey, and began a voyage at 7:20 p.m. to a distributor at Island Park, Long Island. The *Whalen* was 166 feet long, 31 feet wide and loaded to a draft of 12 feet. She was equipped with gyro and

magnetic compasses, a searchlight having a range of half a mile, radar, radio direction finder, ship-to-shore radio, and a fathometer. She had a chart of the area, which was one year old and did not reflect the fact that the color of the Rockaway Point breakwater light had been changed from red to white.

The *Whalen*'s captain, John E. Lindroth, had not listened to the Coast Guard broadcast at 7:20 a.m., which reported that the Rockaway Inlet breakwater light was not operating. The Coast Guard's evening broadcast at 7:20 p.m. did not repeat this information, and this also was not heard by Captain Lindroth.

The wind on the evening of December 23 was at gale force, approximately 40 to 45 knots from the northwest, with gusts of greater velocity. Captain Lindroth was licensed as a pilot for the entire east coast, specifically including Rockaway Inlet and East Rockaway Inlet. He had made the voyage from Constable Hook to Island Park over a thousand times, but this was the first time he had done it in 1968. With him in the wheelhouse were the mate, Stian Larsen and a deckhand, Daniel Wilhelmsen. Larsen was a licensed pilot, but not licensed for the Rockaway Inlet area. Larsen did not require such a license as long as Lindroth was in command. Wilhelmsen was supposed to act as lookout when he was in the wheelhouse. He said that he made no reports to Captain Lindroth because the captain usually sees things before the lookout.

The course from Constable Hook to Island Park goes through New York harbor and the Lower Bay, through the Narrows, under the Verrazano Bridge, easterly from Norton Point through the Coney Island Channel to Rockaway Inlet, southerly through Rockaway Inlet to the ocean, and then easterly along the shore to East Rockaway Inlet. Island Park is about

three and a half miles beyond the entrance of East Rockaway Inlet.

The Rockaway Inlet course begins at a lighted flashing green buoy No. 9 ("G9"). At that point, Lindroth turned the *Whalen* south on a course of 180° on her gyro compass. The easterly side of Rockaway Inlet is marked by the Rockaway Inlet light which has a 13-mile range, the breakwater, the Rockaway Point breakwater light near its southerly tip, and a red bell buoy "R4" about a hundred yards south of the tip. The breakwater light was about 1.1 miles from buoy "G9". The breakwater light was usually visible for about four miles. There was also a lighted flashing red entrance buoy "R2" with a gong about 1,250 yards south of the breakwater. The westerly side of Rockaway Inlet is marked by unlighted buoys "C7", "C5", and a red and black gong buoy ("RB") located about 525 yards southwest by west from the breakwater light. The channel is about 400 yards wide.

After turning southward at "G9" into the southerly part of Rockaway Inlet, Lindroth turned the *Whalen*'s searchlight on the breakwater and buoy "C5". Although it was a windy night, there was 10 miles visibility. Beyond the breakwater was open ocean and an unrestricted horizon. While advancing through the Inlet, Lindroth pointed out the navigational aids to mate Larsen. About a half hour before the stranding, as they came down the Inlet, according to Larsen, "the captain said there was supposed to be a light there on the point but it was out." This observation was confirmed by Wilhelmsen.

The tide was at flood, running about two miles toward the northwest, and thus reducing the speed of the *Whalen,* which normally made about 10 knots. It was doing about 8 knots over the ground. Waves were 8 to 10 feet high.

THE TOW WHICH INTERFERED WITH THE "WHALEN'S" COURSE

When the *Whalen* was in the vicinity of the "RB" gong, the Captain noticed for the first time a barge ahead off the port side. He sent Wilhelmsen down to get coffee, and continued on his course, intending to pass the barge and turn in front of it. As he started to pass the barge, he observed the lights of a tug which was pulling it. Since the tug appeared to be stationary, he decided to continue and cross ahead of the tug. On overtaking the barge, however, he noticed that the tug was speeding up and moving further south. He determined that he could not overtake the tug, and decided to turn around and pass astern of the barge. He turned right from his 180° course to a course of 220° and proceeded southwest for two to four minutes, then turned north to complete a U-turn. When he came astern of the barge, he turned to the right on an easterly course of 73° on his gyro compass. This was the normal course from the entrance of Rockaway Inlet to lead into East Rockaway Inlet. Within a minute, he saw a dark shadow ahead and asked the deckhand to shine the searchlight on it. The shadow proved to be the Rockaway Point breakwater light structure, about 350 feet in front of him. He turned to the left because there were rocks to the right, and the vessel landed broadside in the sand.

Captain Lindroth made no effort to check his position before adopting the 73° course, except to look for a red light on the breakwater. He did not turn on the radar, which had an accuracy from 25 to 50 feet. He did not use his searchlight to pick up the "R4" buoy or the breakwater, although he had used it before turning from Coney Island channel into Rockaway Inlet. He did not take a fix on the Rockaway

Inlet light, which was 1,450 yards north of the breakwater light, although he had earlier noticed that the breakwater light was out. He left his chart in the drawer. He had not used his radio to check the position and course of the tug before making the U-turn maneuver. Apparently, neither the mate nor the deckhand had reported any observations of lights or buoys. Captain Lindroth testified that it was difficult to see white lights in the heavy sea which was running at the entrance to the Inlet.

There are two alternate courses from Rockaway Inlet to Island Park. The first, which Lindroth was attempting to take, goes through a narrow stretch of deep water between the breakwater and a shoal southeast of the "R4" buoy. The second goes south of the shoal beyond the "R2" buoy before turning easterly. Either course was proper. With the heavy seas in the ocean, the course near shore was a permissible one, if the Captain had been sure that he was south of the breakwater and north of the shoal before turning east.

Captain Lindroth testified on three different occasions, once at a Coast Guard hearing concerning the stranding, again on a deposition taken by the defendant, and a third time at the trial. His description of his sighting of the barge and tug and of his U-turn maneuver differed on each occasion. The court must therefore rely mainly on the physical facts. It is appropriate to accept his testimony on cross-examination at the trial, that the *Whalen* stranded within a minute or two after making her turn to a 73° course. At 8 knots, she would travel about 800 feet in one minute. His testimony at the deposition that the vessel traveled seven minutes on a 73° course is inconsistent with any indicated positions and should not be credited. Captain Lindroth testified that he realized at the time

of the trial that he was too far north to set a 73° course, and said that the flood tide was responsible. In other words, he did not know where he was when he made his fateful turn.

THE REPAIRS OF THE ROCKAWAY BREAKWATER LIGHT

The Coast Guard was notified five times in a month, on November 29, and December 1, 9, 18, and 22, 1968, that the breakwater light was not operating. The Coast Guard Manual required that this light, being in a major channel, should be restored to operation within two hours after any report that it was out of operation.

After each outage was reported, the Coast Guard repaired it within from 2½ to 18 hours. Most repairs were made by Boatswain's Mate Frederick H. Lee. He had been in the service for two years and a half, had received six weeks training on maintenance of navigational aids, and had spent eighteen months on a buoy tender before being assigned to the Rockaway station. He first checked the lamp changer, and on December 2 installed a new one. On subsequent visits he changed the flasher, the lamps, the battery cable, and the photoelectric cell. He checked the batteries each time by using a volt meter with the light off and with the light on, keeping the light on for 10 or 15 minutes by holding his hat over the photoelectric cell. The 12-cell battery registered 13.5 volts with the light off and 13 volts with the light on, which represented a normal variation for a load. Lee did not keep the light on for two or three hours, which would have been a more reliable test, to show whether the battery was really sound or whether it had simply recovered temporary strength during the several hours of rest which it would have during each day-time period. It would have been

difficult to stay at the light for so long a period on a winter day.

The batteries had an expected life of 400 days. Having last been replaced in June 1968, they were not due for replacement until September 1969. However, the previous batteries had lasted only three months, having been put in place on March 20, 1968 and replaced on June 20, 1968. On December 27, 1968, after the stranding, the batteries were replaced and the light thereafter burned properly.

On only one of the occasions in December when the light was reported out did the Coast Guard follow up its repairs with any night-time inspection to see whether the repairs were effective. On December 10th, Electrician's Mate Cable made a visual inspection from the beach between 10:00 and 11:00 o'clock and found the light watching properly. The light could not be seen overland from the nearest Coast Guard station, but there was at least one 44 foot Coast Guard cutter which could have been used for observation from Rockaway Inlet if access to the beach was not feasible.

There never had been so many successive outages of one light in the Rockaway Coast Guard area.

CONCLUSIONS OF FACT

The Coast Guard did not meet proper standards in its repairs of the Rockaway Point breakwater light. This elevated light, on the lee shore of a relatively narrow marked channel, was an important aid to navigation. This fact was recognized by its designation in the Light List as requiring urgent attention and repair of any discrepancy within two hours.

A night-time verification of the success of the repairs was essential after routine efforts had proved

futile. Such a verification should have resulted in discovery of the need to replace the battery before December 23rd. Lee was a competent man, but the circumstances called for active supervision. Since December 23rd was the last working night before the long Christmas weekend, a proper concern for mariners on a lee shore in a gale should have prompted a responsible officer to verify the flashing of the light on that evening.

The voice warnings to mariners were inadequate and misleading—inadequate because they did not mention that the light had proved undependable during most of December, and misleading because they were not repeated in the evening, in spite of the lesson of experience that prior repairs had not been permanent.

The fault of the vessel was more egregious than the fault of the Coast Guard. Attempting to negotiate a turn to the east, in the narrow space between bell buoy No. 4 and the shoals off Rockaway Point, the Captain set his course without knowing where he was. Obviously, he would not have found the breakwater light looming directly ahead of him within a minute after his change of course, if he had not been north of the point where he believed he was.

Equipped with look-out, chart, searchlight, radiotelephone, and radar, he made use of nothing except his own guesswork judgment. After sighting the tug and tow, making his westward turn to a 220° course and turning in a loop toward the north so as to pass astern of the tow, he should have made sure of his position before setting his new 73° course. The fact that a northwest gale blowing at 45 knots with eight to ten foot seas made it difficult to see, emphasizes the need for caution rather than excusing a turn into the unknown. The Captain's failure to hear the horn

which was adjacent to the breakwater light may be excused by the noise of the storm, but the responsibility of maneuvering a 165-foot boat in dangerous seas called for much greater attention to all available navigational aids.

Allocation of proportionate fault is not capable of mathematical certainty, but the court's judgment is that 75% of the fault rested with the *Mary Whalen* and its Captain and not more than 25% with the government.

DISCUSSION OF LAW

Only brief discussion of the rules of liability is necessary. The major problem is the division of damages.

Jurisdiction of this court exists under either the Suits in Admiralty Act, 46 U.S.C. §§ 740–52 or the Federal Tort Claims Act, 28 U.S.C. § 1346(b). *Russell, Poling & Co.* v. *United States,* 140 F. Supp. 890 (S.D.N.Y. 1956).

The government's liability for the negligent misplacement or non-functioning of navigational aids has been firmly recognized. The Coast Guard may establish and maintain aids to navigation. 14 U.S.C. § 81. Once such aids are established, 14 U.S.C. § 2 requires that they be maintained in proper order and position. *Afran Transport Co.* v. *United States,* 309 F. Supp. 650, 654 (S.D.N.Y. 1969), *Indian Towing Co.* v *United States,* 350 U.S. 6, 76 S. Ct. 122 (1955).

New York law, to the extent it may be applicable, imposes a similar liability on the state for negligent maintenance of aids to vehicular traffic. *Foley* v. *State,* 294 N.Y. 275 (1945).

Negligence of a vessel or a mariner may be shown by the government either to deny proximate cause or to constitute a partial defense under the admiralty

rule of dividing damages. *Russell, Poling & Co.* v. *United States, supra,* 140 F. Supp. at 892–94; *Indian Towing Co.* v. *United States,* 182 F. Supp. 264 (E.D. La. 1959), aff'd, 276 F. 2d 300 (5th Cir. 1960).

Plaintiff asserts that the Coast Guard's breach of its statutory duty to maintain the light gives it the benefit of the rule of *The Pennsylvania,* 86 U.S. (19 Wall.) 125 (1873), that the violator must prove that his fault could not have been a cause of the accident. *The Pennsylvania* is not applicable here, since both parties have been found at fault—and *The Pennsylvania* divided damages in spite of one party's violation of a statutory duty.

Negligence is basically a question of fact, with no two cases alike. None of the cases cited by plaintiff are close enough to the present one to defeat the court's finding that negligence on the part of the *Whalen* and its captain was a proximate cause of the stranding.

Plaintiff cites *Universe Tankships, Inc.* v. *United States,* 336 F. Supp. 282 (E.D. Pa. 1972), for the argument that the *Mary Whalen* was guilty of no negligence and that all the fault should be placed on the Coast Guard. That was a different case, however; the buoy marking a turn in the river had been placed in a wrong position by Coast Guard personnel and the court found on the facts that there was no negligence on the part of the vessel or its master in failing to note the misplacement of the buoy. There was no evidence in *Universe Tankships* that the vessel failed to utilize other means available to ascertain her true position.

The principle that total blame need not be placed on the United States for failure of a navigational aid is illustrated by *Philadelphia Electric Co.* v. *Curtis Bay Towing Co.,* 260 F. Supp. 505 (E.D. Pa. 1966),

aff'd, 390 F. 2d 125 (3d Cir. 1968), where it was held that the ship should have realized that a buoy was clearly out of place, and *Hamburger* v. *United States*, 318 F. Supp. 103 (D. Md. 1970), where it was held that checking the pertinent chart would have shown that the particular light was not operating.

DIVISION OF DAMAGES

The rule of equal division of damages has long applied in admiralty cases where both parties are at fault. While division of damages in proportion to the degrees of fault may be more equitable, it appears to be forbidden by controlling precedent.

Proportionate division of damages in admiralty personal injury cases has become the law in this circuit. *Ahlgren* v. *Red Star Towing & Transp. Co.*, 214 F. 2d 618, 621 (2d Cir. 1954). In a personal injury claim arising from a collision between a sailboat and a tanker, it was held proper to charge the jury that if both parties were negligent, the jury should decrease the amount of plaintiff's recovery "by a percentage which would represent the extent to which he was to blame." *Topor-Taparek* v. *Socony Mobil Oil Co., Inc.*, 339 F. 2d 792, 794 (2d Cir. 1964). In Jones Act cases relating to injuries to seamen, within the admiralty jurisdiction, the rule of proportionate negligence applies, but this is by virtue of statute. 49 U.S.C. § 688, 45 U.S.C. § 53. Liability for indemnification for personal injuries in admiralty cases has been based on comparative negligence, as a matter of interpretation of contract, without benefit of statute. *United States* v. *Seckinger*, 397 U.S. 203, 90 S. Ct. 880 (1970). *Cf. Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 74 S. Ct. 202 (1953).

In collision cases, on the other hand, equal division of damages has traditionally been applied. *The North*

Star, 106 U.S. 17, 1 S. Ct. 41 (1882); *The Max Morris*, 137 U.S. 1, 13, 11 S. Ct. 29, 32 (1890); *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597, 603, 83 S. Ct. 926, 930 (1963).

The Supreme Court stated in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 284, 72 S. Ct. 277, 279 (1952), that the Court had never expressly applied the rule of equal division of damages to non-collision cases. (The holding in *Halcyon* was that an unseaworthy vessel could not obtain contribution from a negligent ship-chandler whose employee was hurt). The rule of equal division of damages had earlier been applied in a case where a vessel sank in a canal due to negligence of both the shipowner and the canal company, a case analogous to the present one. *White Oak Transportation Co.* v. *Boston, Cape Cod & New York Canal Co.*, 258 U.S. 341, 42 S. Ct. 338 (1922).

Judge Abruzzo of this court once divided damages in a collision case in the proportion of 60% and 40%, and was affirmed in that result by the Court of Appeals. *Marine Fuel Transfer Co.* v. *The Ruth*, 135 F. Supp. 371 (E.D.N.Y. 1955), aff'd, 231 F. 2d 319 (2d Cir. 1956). The issue of unequal division of damages was not mentioned by the Court of Appeals, and may not have been raised by either appellant.

Judge Learned Hand criticized the equal division rule in his dissent in *Ulster Oil Transport Corp.* v. *The Matton No. 20*, 210 F. 2d 106, 110 (2d Cir. 1954), but he was unable to persuade either of his colleagues to join him. A few years later, the court stated that the rule of equal division was too well established for a court of intermediate jurisdiction to deviate from it. *In re Adams' Petition*, 237 F. 2d 884, 887 (2d Cir. 1956), cert. denied, 352 U.S. 971, 77 S. Ct. 364 (1957). Quite recently, the Court of Appeals for this circuit

has reaffirmed the rule of equal division. *In re Seaboard Shipping Corp.*, 449 F. 2d 132, 138 (2d Cir. 1971). Although *Seaboard Shipping* was a tug-tow case, where the court believed that equal contribution to damages produced an equitable result, the decision does not encourage a district court to rely on Judge Abruzzo's case as current authority.

The Seventh Circuit has required equal division in a case involving a collision between a steamer and a bridge, even though there was a finding of fact that the negligence of the steamer was a proximate cause to the extent of two-thirds of the total fault. *N. M. Paterson & Sons, Ltd.* v. *City of Chicago,* 324 F. 2d 254, 258 (7th Cir. 1963).

The "major-minor fault rule" permits disregard of minimal negligence and grant of full damages where one party's fault is relatively overwhelming. *Koch-Ellis Marine Contractors, Inc.* v. *Chemical Barge Lines, Inc.,* 224 F. 2d 115 (5th Cir. 1955). This case is not an appropriate one to apply the "major-minor fault rule," since the fault of each party was substantial.

Under the compulsion of the *Adams* and *Seaboard Shipping* cases, the court must therefore rule that plaintiff shall recover half its damages from the United States of America. A hearing to fix damages will be held on June 19, 1972 unless the parties reach agreement on the dollar amount before that time.

This memorandum is intended to include the court's findings pursuant to F.R. Civ. P. 52(a).

It is ORDERED that plaintiff is entitled to recover from the defendant half its damages as hereafter agreed or determined.

(s) ORRIN G. JUDD,
U.S. District Judge.

APPENDIX C

United States Court of Appeals for the Second Circuit

73–1513, 73–2325

RELIABLE TRANSFER CO., INC., PLAINTIFF-APPELLEE-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT-APPELLEE

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of May one thousand nine hundred and seventy-four.

Present: Hon. J. Edward Lumbard, Hon. Henry J. Friendly, Hon. William H. Timbers, Circuit Judges.

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

By VINCENT A. CARLEN,
Chief Deputy Clerk.